



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**23 CFR Part 635**

**FHWA Docket No. FHWA-2012-0098**

**RIN 2125-AF47**

**Construction and Maintenance – Culvert Pipe Selection**

**AGENCY:** Federal Highway Administration (FHWA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** Section 1525 of the Moving Ahead for Progress in the 21st Century Act (MAP-21) requires the Secretary of Transportation to modify FHWA regulations to ensure that States shall have the autonomy to determine culvert and storm sewer material types to be included in the construction of a project on a Federal-aid highway. This final rule is intended to implement this legislative requirement.

**DATES:** This rule is effective [Insert date 30 days after date of publication in the Federal Register].

**FOR FURTHER INFORMATION CONTACT:** Mr. Gerald Yakowenko, Office of Program Administration, (202) 366-1562, or Mr. Michael Harkins, Office of the Chief Counsel, (202) 366-4928, Federal Highway Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

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## **Background:**

Under the "Administrative Procedure Act" (5 U.S.C. 553(b)), an agency may waive the normal notice and comment procedure if it finds, for good cause, that it would be impracticable, unnecessary, or contrary to the public interest. The FHWA finds that notice and comment for this rule is unnecessary because it implements a congressional mandate to amend 23 CFR 635.411 to allow States to choose culvert and storm sewer material type. The regulatory amendments in this final rule are based upon the statutory language and FHWA does not anticipate receiving meaningful comments to alter the regulation given the explicit mandate. Accordingly, FHWA finds good cause under 5 U.S.C. 553(b)(3)(B) to waive notice and opportunity for comment.

## **Regulatory History**

The "General Material Requirements," found in 23 CFR part 635 subpart D, supports competitive bidding principles in 23 U.S.C. 112 with certain requirements and

procedures relating to product and material selection and use on Federal-aid highway projects.

Securing competition in the area of culvert pipe material selection has been a concern of FHWA since the 1960s. In an internal Bureau of Public Roads (now FHWA) Memorandum issued October 7, 1963, the Bureau of Public Roads addressed the issue of culvert selection and in general product selection in writing:

... a State's desire to select only one type of pipe for bidding purposes on the basis that such selection will favor State and local public interests cannot be accepted by Public Roads.

This Memorandum further states,

Except where otherwise dictated by engineering evaluations of individual site conditions, there is no basic disadvantage in specifying all acceptable alternate types and either calling for competitive bids on them or permitting the successful bidder to name the type he will furnish. Even when it is indicated that one type might receive lower bid prices, competitive bidding of the one type with other acceptable types could result in lower contract prices.

Through a revision to Policy & Procedure Memorandum 21-6.3 dated October 3, 1972, the FHWA included a table entitled "Summary of Acceptable Criteria for Specifying Types of Culvert Pipes." On September 30, 1974, the table was included in the CFR as an appendix to 23 CFR 635.117 (39 FR 35152). According to § 635.117(d), as in effect in 1974, Appendix A

... sets forth the FHWA requirements regarding the specification of alternate types of culvert pipes, and the number and types of such alternatives which must be set

forth in the specifications for various types of drainage installations.

On September 10, 1976, this section was redesignated as 23 CFR 635.411 (41 FR 36204) and remained unchanged until 2006, though the market had changed to the extent that Appendix A no longer adequately encompassed the universe of available alternatives.

Section 5514 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU, Pub. L.109.59; August 10, 2005), titled “Competition for Specification of Alternative Types of Culvert Pipes,” required the Secretary of Transportation to ensure that States provide for competition with respect to the specification of alternative types of culvert pipes through requirements that are commensurate with competition for other construction materials. To implement this provision, the FHWA issued a final rule on November 15, 2006 (71 FR 66450), that deleted Appendix A from the CFR.

#### **MAP-21 Legislative Provision**

On July 6, 2012, President Obama signed the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405. Section 1525 of MAP-21, “State Autonomy for Culvert Pipe Selection,” requires the Secretary of Transportation, within 180 days of the date of enactment of MAP-21 (October 1, 2012) to modify section 635.411 of title 23 CFR, to ensure that States shall have the autonomy to determine culvert and storm sewer material types to be included in the construction of a project on a Federal-aid highway. The use of the word “autonomy” in this section gives the State

transportation departments (State DOTs) and other direct recipients the sole authority and discretion to make a decision regarding culvert and storm sewer material types without any input or approval from the FHWA. As a result, a State DOT may choose to exercise its autonomy regarding culvert and storm sewer type selection to either:

(a) Include all material types deemed acceptable as a result of engineering and economic analysis, or

(b) Restrict the pool of available culvert and storm sewer material types to those which the State DOT would select.

Although section 1525 gives the States the autonomy to determine culvert and storm sewer material types, section 1525 does not relieve the States of compliance with other applicable Federal requirements, such as Buy America, culvert design standards in 23 CFR Part 625, and the restriction against the use of patented and proprietary products in 23 CFR 635.411. Also, while a State may choose to specify only one type of material, the State may not specify only one specific product among several of the same material type that is chosen unless otherwise permitted to do so under section 635.411. Also, with respect to design standards, the specified type would have to conform to engineering design standards such as structural load, hydraulic capacity, corrosion resistance, etc., and would have to fit into the natural and constructed environment. These culvert design standards are encompassed in the various standards found in 23 CFR part 625.

**Analysis:**

*23 CFR 635.411*

This final rule amends subsection 635.411 to add a paragraph (f) to grant autonomy to State DOTs regarding the selection of culvert and storm sewer material types to be included in Federal-aid highway construction projects. The language would not permit FHWA to limit Federal-aid participation in costs based on the culvert or storm sewer material type selected by the State DOT. However, the State DOTs' use of culvert and storm sewer material shall otherwise comply with all applicable Federal requirements, such as the provisions regarding the use of patented and proprietary products set forth in this section as well as the design standards set forth in 23 CFR part 625.

## **RULEMAKING ANALYSES AND NOTICES**

### **Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures**

The FHWA has determined that this action is not a significant regulatory action within the meaning of Executive Order 12866, and within the meaning of the U.S. Department of Transportation's regulatory policies and procedures. Since this rulemaking implements a congressional mandate to merely allow States to choose culvert and storm sewer material type, and does not require or prohibit the use of a particular type of culvert and storm sewer material, the FHWA anticipates that the economic impact of this rulemaking would be minimal. The FHWA anticipates that this final rule will not adversely affect, in a material way, any sector of the economy. Additionally, this action complies with the principles of Executive Order 13563. In addition, these changes will

not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

### **Regulatory Flexibility Act**

Since FHWA finds good cause under 5 U.S.C. 553(b)(3)(B) to waive notice and opportunity for comment for this rule, the provisions of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601- 612) do not apply. However, the FHWA has evaluated the effects of this action on small entities and has determined that the action would not have a significant economic impact on a substantial number of small entities. The amendment addresses obligation of Federal funds to States for Federal-aid highway projects. As such, it affects only States and States are not included in the definition of small entity set forth in 5 U.S.C. 601.

### **Unfunded Mandates Reform Act of 1995**

This final rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48, March 22, 1995) as it will not result in the expenditure by State, local, tribal governments, in the aggregate, or by the private sector, of \$148.1 million or more in any one year (2 U.S.C. 1532).

### **Executive Order 13132 (Federalism Assessment)**

Executive Order 13132 requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the national

government and the States, or on the distribution of power and responsibilities among the various levels of government. This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 dated August 4, 1999, and the FHWA has determined that this action would not have a substantial direct effect or sufficient federalism implications on the States. The FHWA has also determined that this action would not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions.

#### **Executive Order 12372 (Intergovernmental Review)**

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program. Accordingly FHWA solicits comments on this issue.

#### **Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, et seq.), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The FHWA has analyzed this final rule under the PRA and has determined that this rule does not contain collection of information requirements for the purposes of the PRA.

#### **National Environmental Policy Act**

The FHWA has analyzed this action for the purpose of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and has



determined that this action would not have any affect on the quality of the environment and meets the criteria for the categorical exclusion at 23 CFR 771.117(c)(20).

**Executive Order 12630 (Taking of Private Property)**

The FHWA has analyzed this final rule under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. The FHWA does not anticipate that this final rule would affect a taking of private property or otherwise have taking implications under Executive Order 12630.

**Executive Order 12988 (Civil Justice Reform)**

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

**Executive Order 13045 (Protection of Children)**

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA certifies that this action would not cause an environmental risk to health or safety that might disproportionately affect children.

**Executive Order 13175 (Tribal Consultation)**

The FHWA has analyzed this action under Executive Order 13175, dated November 6, 2000, and believes that the action would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal laws. This final rule addresses

obligations of Federal funds to States for Federal-aid highway projects and would not impose any direct compliance requirements on Indian tribal governments. Therefore, a tribal summary impact statement is not required.

#### **Executive Order 13211 (Energy Effects)**

The FHWA has analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The FHWA has determined that this is not a significant energy action under that order since it is not a significant regulatory action under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

#### **Regulation Identification Number**

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

#### **List of Subjects in 23 CFR Part 635**

Construction materials, Design-build, Grant programs, Transportation, Highways and roads, Culvert material types.

Issued on: January 17, 2013

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Victor M. Mendez  
Federal Highway Administrator

In consideration of the foregoing, title 23, Code of Federal Regulations, part 635 is amended as follows:

PART 635 – Construction and Maintenance

1. Revise the authority citation for part 635 to read as follows:

Authority: Sec. 1525 of Pub. L. 112-141, Sec. 1503 of Pub. L. 109-59, 119 Stat. 1144; 23 U.S.C. 101 (note), 109, 112, 113, 114, 116, 119, 128, and 315; 31 U.S.C. 6505; 42 U.S.C. 3334, 4601 *et seq.*; Sec. 1041(a), Pub. L. 102-240, 105 Stat. 1914; 23 CFR 1.32; 49 CFR 1.85(a)(1).

2. Amend § 635.411 by adding paragraph (f) to read as follows:

**§ 635.411 Material or product selection.**

\* \* \* \* \*

(f) State transportation departments (State DOTs) shall have the autonomy to determine culvert and storm sewer material types to be included in the construction of a project on a Federal-aid highway.

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01/28/2013]